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CONSTITUTIONAL POLITICS, CONSTITUTIONAL LAW, AND THE THIRTEENTH AMENDMENT

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I. INTRODUCTION

In his contribution to this symposium, Alex Tsisis addresses *Congressional Authority to Interpret the Thirteenth Amendment*,¹ responding to an article on the same subject by Jennifer Mason McAward.² He argues, correctly, that the Republicans who passed the Civil Rights Act over President Andrew Johnson's veto in 1866 intended for the second section of the Thirteenth Amendment to delegate broad power to Congress to secure the rights and privileges associated with freedom in the United States.³ Both essays are very much constitutional *law* essays. They address the powers of Congress in terms of legal principles and arguments of the sort that ultimately would be presented to courts testing the constitutionality of the broad legislation the essays envision.

Both arguments are addressed to Congress as well. McAward tells congressmen and congresswomen that broad legislation to protect rights would be unconstitutional, while Tsisis tells Congress the opposite.⁴ Bound by their oaths to support the Constitution, congressmen and congresswomen should refrain from passing such legislation if McAward is right; they are free to pass such legislation if Tsisis is right. However, while many congressmen and congresswomen are lawyers, they are politicians first and foremost. They no doubt see their jobs primarily to reflect the national interest and the interests of their constituents, not to make determinations of constitutional law. One should not be surprised that many congresspersons who favor

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1. Alexander Tsisis, *Congressional Authority to Interpret the Thirteenth Amendment*, 71 MD. L. REV. 40 (2011).

2. Jennifer Mason McAward, *The Scope of Congress's Thirteenth Amendment Enforcement Power After City of Boerne v. Flores*, 88 WASH. U. L. REV. 77 (2010).

3. Tsisis, *supra* note 1, at 43–45.

4. McAward, *supra* note 2, at 134–42 (“Moreover, the historical record does not indicate that any of the framers of the Thirteenth Amendment contemplated, much less endorsed, such an expansive view of Congress's interpretive powers.”); Tsisis, *supra* note 1, at 53–56.

such legislation might pass it on the understanding that it is ultimately the role of the Supreme Court of the United States to decide which legal argument is right, rather than theirs—especially when the Supreme Court appears to claim a monopoly on constitutional interpretation.⁵

II. CONSTITUTIONAL POLITICS IN THE NINETEENTH CENTURY

That the Supreme Court had such primacy in constitutional interpretation was not the understanding of congressmen (and they were all congressmen) at the time they framed the Thirteenth Amendment. Congress passed the Thirteenth Amendment and the Civil Rights Act of 1866⁶ in a different constitutional world than the one Americans know today. It was a world in which politics and political choices were predominantly articulated in constitutional terms, with a powerful conviction that all actions of government must meet constitutional requirements. There was no need for a House rule mandating that every legislative proposal expressly identify a source of constitutional authority; the manager of any bill that might raise constitutional objections began by articulating its constitutional justification. Sometimes the constitutional arguments had been so well established that congressmen did not think it necessary to follow this general rule. However, as soon as an opponent raised a constitutional objection, proponents had to respond, and they did so at length. As the late Professor David P. Currie observed, “virtually everything became a constitutional question—from great controversies like those over the national bank and the president’s removal power to ephemera of exquisite obscurity.”⁷ In scope, length, and number of subjects, throughout the nineteenth century—and certainly as the Thirteenth Amendment was framed—constitutional debates in Congress dwarfed the attention to issues of constitutional power in the Supreme Court.⁸ American politics revolved around questions like the constitutionality of a national bank, a protective tariff, and of federal promotion of transportation, communications, and education.⁹ Americans fought

5. *City of Boerne v. Flores*, 521 U.S. 507, 531–32, 535–36 (1997) (holding that Congress exceeded its power under Section 5 of the Fourteenth Amendment by passing the Religious Freedom Restoration Act).

6. Ch. 31, § 1, 14 Stat. 27 (1866).

7. David P. Currie, *Prolegomena for a Sampler: Extrajudicial Interpretation of the Constitution, 1789–1861*, in CONGRESS AND THE CONSTITUTION 21 (Neal Devins & Keith E. Whittington eds., 2005).

8. *Id.* at 22–23.

9. For constitutional politics in the Early Republic and Jeffersonian Republican eras, see Michael Les Benedict, *The Jeffersonian Republicans and Civil Liberty*, in ESSAYS IN THE

over the malleability of citizenship and the constitutionality of the Sedition Act of 1798¹⁰ and of nullification.¹¹ The issue of state versus federal control of policy towards Native Americans roiled American politics as tendentiously as it did the Supreme Court;¹² and so, of course, did the constitutional issues surrounding slavery.¹³

In none of these examples did a court ruling settle the issue. Before the Civil War, the great constitutional issues were decided by the American people, not the Supreme Court. The process was essentially political, not legal—constitutional politics rather than constitutional law. The arguments, often made by lawyers in Congress, bore a distinct resemblance to those they might make in court. These arguments were aimed neither at judges nor fellow congressmen. As congressional correspondent Noah Brooks observed, when a congressman spoke, “only a scattered few” even remained in their seats.¹⁴ The speaker’s argument was “wasted” on the members, he explained,

HISTORY OF LIBERTY: SEAVER INSTITUTE LECTURES AT THE HUNTINGTON LIBRARY 23, 23–41 (1988) (arguing that the political battles between Federalist Jeffersonian Republicans largely defined present-day conceptions of freedoms guaranteed in the Constitution) and H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS 137–46 (2002) (discussing Republican constitutional debates of the early 1800s). For constitutional politics in the Jacksonian Era, see Gerald Leonard, *Party as a “Political Safeguard of Federalism”: Martin Van Buren and the Constitutional Theory of Party Politics*, 54 RUTGERS L. REV. 221, 268–76 (2001) (describing how party politics became institutionalized in the Jacksonian Era). See generally GERARD N. MAGLIOCCA, ANDREW JACKSON AND THE CONSTITUTION: THE RISE AND FALL OF GENERATIONAL REGIMES (2007) (analyzing the transformation of constitutional politics and theory during the Jacksonian Era).

10. The Alien and Sedition Act of 1798 enabled the government to punish dissent and criticism. DOUGLAS BRADBURN, THE CITIZENSHIP REVOLUTION: POLITICS AND THE CREATION OF THE AMERICAN UNION 1774–1804, at 101–67 (2009); POWELL, *supra* note 9, at 55–66; JUHANI RUDANKO, THE FORGING OF FREEDOM OF SPEECH: ESSAYS ON ARGUMENTATION IN CONGRESSIONAL DEBATES ON THE BILL OF RIGHTS AND ON THE SEDITION ACT 59–86 (2003).

11. Nullification was a constitutional theory maintaining that a state, as the sovereign political entity in the Union, could determine a federal law unconstitutional and “nullify” its operation within its borders. DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829–1861, at 89–119 (2005). See generally RICHARD E. ELLIS, THE UNION AT RISK: JACKSONIAN DEMOCRACY, STATES’ RIGHTS, AND THE NULLIFICATION CRISIS (1987); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 72–112 (1999).

12. See generally Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500 (1969); JILL NORGREN, THE CHEROKEE CASES: THE CONFRONTATION OF LAW AND POLITICS (1996).

13. See generally DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM, 1829–1861 (2005) (discussing the slavery issue in Congress from 1829 to 1861).

14. MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 89 (2001) (quoting *Letter of Castine*, SACRAMENTO DAILY UNION, March 14, 1964, at 1). “Castine” was Noah Brooks’s journalistic *nom de plume*.

“for the speech is not intended for any special effect in the House or Senate, but upon the country.” Used as campaign documents, or circulated by the speaker to his constituents, “it flies all over the country, and has its small sum of influence upon the masses of the people.”¹⁵

Congressmen sent the daily records of Congress to local newspaper editors and constituents. Carefully revised versions of speeches—sometimes never actually presented on the floor—were published and republished in newspapers, printed in pamphlet form, and “broadcast” in congressmen’s districts or statewide as campaign documents. For example, Charles Sumner’s 1866 argument for the extension of equal civil and political rights to African-Americans¹⁶ was quoted extensively in the *Lowell (Mass.) Daily Citizen & News*.¹⁷ The *Citizen & News* took its report from a longer one that it informed its readers “occupies over fourteen columns of the *Boston Journal*.”¹⁸ Sumner arranged to publish the same speech as a pamphlet entitled *The Equal Rights of All*.¹⁹ The eminent Republican leader James G. Blaine later told readers that Sumner’s speeches did not impress his colleagues.²⁰ Heard aloud, they were too much like “laborious essays,” Blaine explained. But he acknowledged that circulated in print “they were the antislavery classics of the day.” His arguments went “to the million” who made public opinion.²¹

Suffused by constitutional issues, nineteenth-century politics was different in character than politics has been during most of our time. For most of the twentieth century, jurisprudence distinguished politics from law. The *judicial* branch of government set the boundaries within which the *political* branches of government could act. Within those legal boundaries, the political branches were free to make un-

15. *Id.*

16. CONG. GLOBE, 39th Cong., 1st Sess. 670–87 (1866).

17. *The Great Speech of Senator Charles Sumner*, LOWELL (MASS.) DAILY CITIZEN & NEWS, Feb. 7, 1866.

18. *Id.*

19. CHARLES SUMNER, THE EQUAL RIGHTS OF ALL: THE GREAT GUARANTEE AND PRESENT NECESSITY, FOR THE SAKE OF SECURITY, AND TO MAINTAIN A REPUBLICAN GOVERNMENT—SPEECH OF HON. CHARLES SUMNER, OF MASSACHUSETTS, IN THE UNITED STATES SENATE, FEBRUARY 6 AND 7, 1866 (1866). Using only clippings collected from Sumner’s own papers, the editors of *The Works of Charles Sumner* reprinted reports and editorial comments on Sumner’s speech from newspapers in fourteen cities, ranging from Belfast, Maine, to Dayton, Ohio. Private correspondents from around the country told Sumner they had read it. CHARLES SUMNER, 9 THE WORKS OF CHARLES SUMNER 247–66 (1870–1883).

20. JAMES G. BLAINE, 1 TWENTY YEARS IN CONGRESS, FROM LINCOLN TO GARFIELD 318 (1884).

21. *Id.*

constrained policy choices. Nineteenth-century Americans made no such distinction.

Today many constitutional scholars again recognize that the distinction between politics and law is overstated. American constitutional policy is made through an essentially political process, which has been increasingly influenced by the courts and law,²² but not finally determined by either. It is affected not only by the esoteric constitutional jurisprudence of lawyers and judges, but also by popular constitutional convictions that both shape and are shaped by political debate.²³

In the nineteenth century, politicians went to the people on the great constitutional issues of the times. Every Democratic national platform from 1840 to 1856 began with the party creed, the first principle of which was “[t]hat the Federal Government is one of limited powers, derived solely from the constitution [sic], and that grants of power therein ought to be strictly construed”²⁴ As late as 1888, the Democratic platform reaffirmed that “[c]hief among the principles of party faith are . . . devotion to a plan of government regulated by a written Constitution, strictly specifying every granted power

22. JOHN J. DINAN, *KEEPING THE PEOPLE’S LIBERTIES: LEGISLATORS, CITIZENS, AND JUDGES AS GUARDIANS OF RIGHTS* 167 (1998). John Dinan distinguished among three eras, or “regimes,” that provided differing means for the protection of rights—a “republican” regime that relied on the structure of government and the political process, a “populist” regime that introduced the initiative and the referendum as innovative procedures to protect popular rights, and finally a “judicialist” regime, emerging in the mid-twentieth century, which relied upon judicial review. Dinan’s conclusions are uncongenial to current law-faculty dominated constitutional jurisprudence, and have gained little traction. But they are consistent with other analyses that view ubiquitous judicial review as an artifact of the twentieth century. See, e.g., Ran Hirschl, *The Judicialization of Politics*, in *THE OXFORD HANDBOOK OF LAW AND POLITICS* 119, 119–41 (Keith E. Whittington et al. eds., 2008).

23. Bruce Ackerman played a crucial role in breaking down the distinction between politics and constitutional law by proposing instances in which politics switched to a “higher track,” leading to what he called constitutional “transformations.” See generally Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *YALE L.J.* 453 (1989) (arguing that the American people have sometimes in effect amended the Constitution through “higher track” constitutional politics rather than by the means specified in Article V of the Constitution); BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (2000) (same). Steven Griffin has proposed abandoning the distinction between constitutional law and politics entirely. See STEVEN GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* 18 (1996). See also LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); Robert Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 *HARV. L. REV.* 4 (2003); MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); WAYNE MOORE, *CONSTITUTIONAL RIGHTS AND POWERS OF THE PEOPLE* (1996).

24. NATIONAL PARTY PLATFORMS 1840–1972, at 2, 3, 10, 16, 24 (Donald Bruce Johnson & Kirk H. Porter eds., 1973) [hereinafter NATIONAL PARTY PLATFORMS].

and expressly reserving to the States or people the entire ungranted residue of power.”²⁵

Whigs, who advocated the use of federal power to promote economic development, endorsed in their 1848 platform a Constitution “cherished in the affections because protective of the interests of the people,” to be construed by “wise and generous rules,” as advocated by George Washington.²⁶ All knew the Whigs meant to contrast Washington’s “wise and generous rules” to Democratic strict construction.²⁷ But Democratic state-rights federalism proved so attractive to American voters that by 1852 Whigs conceded in their platform that “all powers not granted or necessarily implied are expressly reserved to the States respectively and to the people” and that the state governments “should be held secure in their reserved rights.”²⁸ Nonetheless, other articles endorsed a protective tariff, deemed unconstitutional by Democrats, and insisted that “[t]he Constitution vests in Congress the power to open and repair harbors, and remove obstructions from navigable rivers, whenever such improvements are necessary for the common defence, and for the protection and facility of commerce”²⁹ In contrast to the Democrats’ obsession with state rights, the Whigs urged that “Federal and State Governments are parts of one system, alike necessary for the common prosperity, peace and security, and ought to be regarded alike with a cordial, habitual and immovable attachment.”³⁰

Republicans likewise articulated a constitutional vision. The first resolution of their first national platform said that the Constitution “embodied” the egalitarian and antislavery principles of the Declaration of Independence.³¹ The implication was clear: unlike Democrats who insisted the Constitution protected slavery, Republicans would interpret the Constitution in light of the Declaration’s affirmation that governments are established to protect natural rights. Republicans likewise stated their key political promise in constitutional terms: that the Constitution confers upon Congress sovereign powers over the territories of the United States for their government; and that in

25. *Id.* at 77.

26. *Id.* at 15.

27. *Id.*

28. *Id.* at 20.

29. *Id.*

30. *Id.*

31. “That the maintenance of the principles promulgated in the Declaration of Independence, and embodied in the Federal Constitution are essential to the preservation of our Republican institutions, and that the Federal Constitution, the rights of the States, and the union of the States, must and shall be preserved.” *Id.* at 27.

the exercise of this power, it is both the right and the imperative duty of Congress to prohibit in the territories those twin relics of barbarism—polygamy and slavery.³²

Like the Whigs before them, the Republicans declared that congressional appropriations promoting transportation and communications “are authorized by the Constitution, and justified by the obligation of the Government to protect the lives and property of its citizens.”³³ In all, Republicans cited the Constitution in six of the eight resolutions issued by their first national convention.

The 1860 Republican platform echoed the constitutional principles of 1856, but conceded “the right of each state to order and control its own domestic institutions according to its own judgment exclusively.”³⁴ It added a new constitutional argument to justify banning slavery in the territories: “that ‘no persons should be deprived of life, liberty or property without due process of law.’” It was the Republican Party’s “duty, by legislation, whenever such legislation is necessary, to maintain this provision of the Constitution against all attempts to violate it”³⁵

In an era when people voted for parties rather than candidates, partisans attacked and defended specific policies in terms of constitutional principles.³⁶ From the era of the American Revolution at least through the era of Reconstruction, all politics were constitutional politics.

III. THE COURTS IN AN ERA OF CONSTITUTIONAL POLITICS

Note that in their 1860 platform, Republicans avowed that it was the responsibility of Congress to pass legislation to assure that no one was deprived of liberty without due process of law in the territories. They did not mention the courts.³⁷ In the same plank, the Republicans denied “the authority of Congress, of a territorial legislature, or of any individuals, to give legal existence to slavery in any territory of the United States.”³⁸ No doubt many Republicans believed the courts ought to enforce that constitutional limitation on federal power.

32. *Id.*

33. *Id.* at 28.

34. *Id.* at 32.

35. *Id.*

36. See Michael Les Benedict, *The Party Going Strong: Congressional Elections in the Mid-Nineteenth Century* (1981), reprinted in *PRESERVING THE CONSTITUTION: ESSAYS ON POLITICS AND THE CONSTITUTION IN THE RECONSTRUCTION ERA* 47, 51–56 (2006).

37. NATIONAL PARTY PLATFORMS, *supra* note 24, at 32.

38. *Id.*

However, there was no prospect that courts would do so as long as Democrats remained in political power. To the contrary, in *Dred Scott v. Sandford*, the Supreme Court held that Congress was bound to protect the right of Americans to bring slaves into federal territory.³⁹ Everyone understood that the plank meant that Republicans intended to carry out their interpretation of the Constitution by continuing to pass legislation to bar slavery in the territories, no matter what the Supreme Court said, and to place on the Court Justices who agreed with their interpretation.

Republicans took a similar position with regard to the second holding in *Dred Scott*, that African-Americans were not citizens of the United States. Sumner manifested Republican attitude when the black citizenship issue arose in 1864. "I take it that each branch of the Government can interpret the Constitution for itself," he said. "I think that Congress is as good an authority in its interpretation as the Supreme Court, and I hope that Congress, in its legislation, will proceed absolutely without any respect to a decision which has already disgraced the country and which ought to be expelled from its jurisprudence."⁴⁰

Judicial review plays a powerful role in today's constitutional politics, but it played a more ambiguous role in the nineteenth-century constitutional system. The Supreme Court and judges of the lower federal courts had regularly claimed the power to refuse to apply congressional laws that they found inconsistent with the Constitution, but they had done so mainly while upholding them and often in decisions that went unreported.⁴¹ And in no case before *Dred Scott* did the Supreme Court exercise judicial review in a way that would "create significant obstacles to the policies strongly favored by dominant political actors at the time."⁴²

Modern jurisprudents treat the Supreme Court's 1803 opinion in *Marbury v. Madison*⁴³ as the definitive statement of its final authority to interpret the Constitution. In that opinion the Court boldly claimed that it was "emphatically the duty of the judicial department to say what the law is."⁴⁴ Comparing acts of Congress to the Constitution

39. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 452 (1856).

40. CONG. GLOBE, 38th Cong., 1st Sess. 1363 (1864). The issue arose during debate on a bill to establish territorial government in Montana.

41. Keith E. Whittington, *Judicial Review of Congress Before the Civil War*, 97 GEO. L.J. 1257 (2009).

42. *Id.* at 1308. Whittington, the analyst who made this observation, has most closely detailed early instances of judicial review.

43. 5 U.S. (1 Cranch) 137 (1803).

44. *Id.* at 163.

was “of the very essence of judicial duty.”⁴⁵ But the Court’s actual conduct at the time had belied its claim. At the time, *Marbury* was considered a threat to rule key Jeffersonian Republican legislation unconstitutional.⁴⁶ When push came to shove, however, the Court had backed down.⁴⁷ In the words of one analyst, the result left *Marbury* little more than “a bold but empty assertion of judicial power.”⁴⁸ As a result, for most of the nineteenth century *Marbury* was known only as a minor case involving jurisdiction. Only when the Supreme Court began to assert primary authority to interpret the Constitution in the late nineteenth century did it cite *Marbury* as authority for judicial review as we know it.⁴⁹

The constitutionality of federal legislation also arose when state laws were challenged as inconsistent with federal laws or provisions of the U.S. Constitution. A completely deferential Court might have assumed the constitutionality of federal laws and limited itself to judging whether the challenged state laws were compatible with them. Instead, the Court considered the constitutionality of the federal law as part of its assessment, most famously in *McCulloch v. Maryland*⁵⁰ and in cases where state “personal liberty laws” were said to conflict with the federal Fugitive Slave Act.⁵¹ In the process of considering the constitutionality of state laws, some Justices took the opportunity to interpret U.S. constitutional provisions, especially the Interstate Commerce Clause, in ways that implied limits on federal power.⁵² Yet as of 1865

45. *Id.* at 178.

46. The legislation in question was the Jeffersonian Republican repeal of the Judiciary Act of 1801, passed by their Federalist opponents to entrench Federalist judges in the federal court system. The question was whether the Supreme Court would rule it unconstitutional. See BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* 147–98 (2005); LAWRENCE GOLDSTONE, *THE ACTIVIST: JOHN MARSHALL, MARBURY V. MADISON, AND THE MYTH OF JUDICIAL REVIEW* 224–30 (2008).

47. *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803).

48. Michael W. McConnell, *The Story of Marbury v. Madison: Making Defeat Look Like Victory*, in *CONSTITUTIONAL LAW STORIES* 1, 31 (Michael C. Dorf ed., 2004).

49. Davison M. Douglas, *The Rhetorical Uses of Marbury v. Madison: The Emergence of a “Great Case,”* 38 *WAKE FOREST L. REV.* 375 (2003).

50. 17 U.S. (4 Wheat.) 316 (1819).

51. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842); *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859).

52. See, e.g., *New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837); *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449, 460 (1841) (Taney, J., dissenting).

the Court had never held a congressional enactment unconstitutional in a case testing the constitutionality of a state statute.⁵³

The Supreme Court took a somewhat more active role in protecting rights against state infringement. It did so particularly when those rights arose directly from the U.S. Constitution, federal laws, or treaties, and especially when the Constitution explicitly barred a state action, such as the impairment of contracts.⁵⁴ These decisions really were about federalism. The issue was which rule governed—state or federal—rather than the protection of rights against government in general. The Court carefully eschewed broadening its authority to protect individual rights against state actions by holding in *Barron v. Baltimore* that the Bill of Rights applied only to the federal government.⁵⁵

Nor were state courts a primary forum for the security of liberty. By the mid-nineteenth century, state courts had successfully claimed the power of judicial review, primarily when state legislatures had attempted to interfere with judicial proceedings, to reverse decisions, to deny access to courts, or to shift legal proceedings to other forums—violations of what we would now call procedural due process of law.⁵⁶ Courts were most aggressive when laws impaired the obligation of a contract in violation of the express prohibition in the U.S. Constitution.⁵⁷ In a few cases, other offending statutes were said to deprive victims of property without due process of law.⁵⁸ But while pregnant

53. *Whittington*, *supra* note 41, at 1270–1325. The Court did rule on constitutional principles that congressional efforts to limit state discretion through provisions of acts admitting them to statehood were not legally enforceable. *Id.* at 1314–15.

54. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) (law repealing grant of land to investors impairs a contract in violation of the Contracts Clause of the U.S. Constitution); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813) (state law confiscating estates of Revolutionary Era Tories held inconsistent with U.S. Treaty of Paris ending the Revolutionary War); *Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (state alteration of a college charter impairs the contract embodied in the original charter in violation of the Obligation of Contracts Clause).

55. 32 U.S. (7 Pet.) 243 (1833).

56. See Donald F. Melhorn, *Jupiter's Sons: Greene County's Citizen Judges and the Sweeping Resolution, 1810–1814*, in 1 *THE HISTORY OF OHIO LAW* 238, 238–66 (Michael Les Benedict & John F. Winkler eds., 2004); DONALD F. MELHORN, *LEST WE BE MARSHALL'D: JUDICIAL POWERS AND POLITICS IN OHIO, 1806–1812* (2003) (describing conflicts over judicial review in early nineteenth century Ohio); JOHN PHILLIP REID, *LEGISLATING THE COURTS: JUDICIAL DEPENDENCE IN EARLY NATIONAL NEW HAMPSHIRE* (2009). See generally RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* (1971). For the close link between procedural due process and early instances of judicial review, see Edward S. Corwin's classic, *The Doctrine of Due Process of Law Before the Civil War*, 24 *HARV. L. REV.* 366, 370–73 (1911).

57. *Id.* at 379–80.

58. *Id.* at 381.

with implications for the future, before the Civil War these instances were rare and confined mainly to New York's singularly aggressive judiciary.⁵⁹ Courts also energetically protected the rights of criminal defendants in court, but as a matter of adhering to common law rules rather than constitutional law.⁶⁰

Thus, as of 1865 neither the state nor the federal courts had played an important role in protecting constitutional rights generally against infringements by the other branches of government. An independent judiciary was recognized as essential to liberty, not because it protected individuals or minorities against the tyranny of the majority but because it guaranteed nonpartisan enforcement of the laws whatever they were. With the exceptions noted above, there was no tradition of going to court to challenge infringements of civil rights on constitutional grounds. In *Barron*, the Supreme Court had explicitly rejected the idea that state actions could be challenged for violating the Bill of Rights,⁶¹ and until *Dred Scott*, when Chief Justice Taney held that barring slavery in the territories deprived southern slaveholders of property without due process of law, it had never struck down a federal law for doing so.⁶²

In such an environment, assuring that public policy accorded with constitutional principles inevitably fell to the political branches and thus the American people themselves. The Constitution's purpose was to guide more than it was to proscribe. As Lemuel Shaw, the great chief justice of Massachusetts's supreme court put it, "The proper province of a declaration of rights and constitution of government . . . is to declare great principles and fundamental truths, to influence and direct the judgment and conscience of legislators in making laws, rather than to limit and control them, by directing what precise laws they shall make."⁶³

As Sumner's blast at the Court, quoted above, indicated, in an era of such judicial restraint, Americans did not consider judicial interpretations of the Constitution to bind the people or the other branches of government. Government officers were bound to enforce courts' specific decisions, but they were not bound to agree with

59. *Id.* at 377–79.

60. See Michael Les Benedict, *Civil Liberty in Ohio*, in 2 *THE HISTORY OF OHIO LAW*, *supra* note 56, at 695–700, for a discussion of the rubrics under which courts protected defendants' rights in Ohio.

61. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833).

62. David S. Bogen, *The Transformation of the Fourteenth Amendment: Reflections from the Admission of Maryland's First Black Lawyers*, 44 MD. L. REV. 939, 974 (1985).

63. *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 206–07 (1849). For further elaboration of this point, see DINAN, *supra* note 22, at 14–22.

their constitutional reasoning or to treat that reasoning as determinative of public policy. No one who lived through the Jacksonian Era could have thought that the Supreme Court's constitutional decisions bound either the people or their representatives in the political branches. The Court's decisions sustained the constitutional nationalism endorsed by the Federalist party, the nationalist wing of the Jeffersonian Republican party, and the Whigs. But Jacksonian Democrats gained and kept power by advocating state rights and strict construction of federal power. They destroyed the National Bank, ended protective tariffs, and repudiated a national system of internal improvements.⁶⁴ Republicans felt no hesitation about repudiating the Taney Court's proslavery constitutionalism. Citing Supreme Court opinions might have strengthened a constitutional argument made in Congress or presented on the stump, but they were hardly determinative. The universal denunciation with which Republicans reacted to the *Dred Scott* decision reflected their conviction that the authority to interpret the Constitution in the end lay with the people, not the Court.⁶⁵

As Larry Kramer demonstrated for the founding era and early republic, and John J. Dinan illustrated for the rest of the nineteenth century, the responsibility for protecting rights lay with the people themselves through the political system.⁶⁶ Antislavery lawyers and politicians like Salmon P. Chase *had* turned to the courts to challenge the grossest federal assault on liberty, the Fugitive Slave Act, and also to argue that setting foot on free territory permanently freed a slave. But it is very unlikely they expected to win. The courts proved a powerful forum for making a constitutional argument to the American people, especially in the days before antislavery advocates secured

64. Thus Professor Currie explained in his preface to the volume on constitutional disputes between Jacksonian Democrats and Whigs in Congress:

The central theme of the present volume is . . . the determined and ultimately successful effort of a succession of largely Democratic Presidents and their congressional allies to limit federal intervention in the economy, whether in the form of support for internal improvements, maintenance of a National Bank, establishment of protective tariffs, or disposition of the public lands.

CURRIE, *supra* note 11, at xii.

65. DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 417–18 (1978).

66. KRAMER, *supra* note 23, at 3–8; DINAN, *supra* note 22, at 60. I think Dinan underestimates the degree to which a “judicialist” regime was developing at the turn of the twentieth century—the period he identifies as the “populist” regime. *See id.* at 116. I also want to distinguish between Kramer and Dinan’s factual observations about popular constitutionalism and their normative proposition, explicit or implicit, that popular constitutionalism should constrain and limit judicial review. As a historian, I am concerned only with the former and take no position on the latter.

election to Congress. Chase's legal arguments became the foundation for the constitutional argument the Republican Party made to the people, and he himself continued to articulate them as a United States senator and then as governor of Ohio.⁶⁷

Take, for example, one of the better known cases in which anti-slavery advocates turned to the courts for succor. In *Roberts v. City of Boston*, Benjamin Roberts and his lawyers Charles Sumner and Robert Morris challenged Boston's segregated school system.⁶⁸ They argued that the local school board's state-sanctioned refusal to admit Roberts's daughter Sarah to an all-white public school violated the provision of the Massachusetts state constitution that declared all persons equal before the law.⁶⁹ As happened elsewhere when African-Americans challenged statutory or administrative discrimination, the Massachusetts supreme court dismissed the suit.⁷⁰ It was not up to the courts to overturn state laws based on general declarations of rights. Chief Justice Shaw explained, "[A]ll those rights of individuals which can be asserted and maintained in any judicial tribunal . . . depend upon the provisions of law."⁷¹ It was in this opinion that Shaw articulated the prescriptive rather than proscriptive nature of constitutions in language worth repeating: "The proper province of a declaration of rights and constitution of government . . . is to declare great principles and fundamental truths, to influence and direct the judgment and conscience of legislators in making laws, rather than to limit and control them, by directing what precise laws they shall make."⁷²

Shaw's understanding had a clear implication for the role of the judiciary, made concrete in the *Roberts* case. If the Constitution were held to "limit and control" legislatures "by directing what precise laws they shall make," courts would be compelled to enforce the limitation and exercise the control.⁷³ That was what Roberts, Sumner, Morris, and other opponents of racial segregation in the schools had asked the Massachusetts courts to do, and that was the invitation that Shaw declined.

67. See Jules Lobel, *A Tradition of Resistance: Antislavery Litigators and the Fight for Freedom*, in JULES LOBEL, *SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA* 46, 50–65 (2003) (discussing Chase's efforts in court).

68. *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 198, 200–01 (1849).

69. *Id.* at 200–01.

70. *Id.* at 210.

71. *Id.* at 206.

72. *Id.* at 206–07. For further elaboration on this point, see DINAN, *supra* note 22, at 14–22.

73. *Roberts*, 59 Mass. (5 Cush.) at 206–07.

What followed illustrated Shaw's proposition as well as the role of constitutional politics in protecting constitutional rights. Making the same arguments they had directed to the courts, in 1855 opponents of segregation secured a law barring school boards from denying admission to students on racial grounds, thus desegregating schools throughout Massachusetts.⁷⁴ Viewed from a long-term perspective, Sumner and Morris's recourse to the courts should be seen as part of a persistent political effort to end school segregation, rather than a judicial alternative to it.

During the congressional debates over the Thirteenth Amendment, Sumner would move to substitute different words for what became its familiar, final language. He proposed that the Amendment read: "All persons are equal before the law, so that no person can hold another as a slave," along with an explicit delegation of power to enforce the declaration.⁷⁵ The utility of the Massachusetts constitution's equality provision in the constitutional politics that had overturned Boston's segregated school system was likely one of the things that led him to urge his colleagues to frame the Amendment in similar terms.

In sum, when Congress proposed and the state legislatures ratified the Thirteenth Amendment, they did not conceive that the courts would be the primary agency that would enforce it. They expected it to be enforced through the political process. An application to the courts might be part of that political process, but it would not be an alternative to it.

IV. THE THIRTEENTH AMENDMENT AND CONSTITUTIONAL POLITICS

The great but very law-oriented constitutional jurisprudent Charles Fairman complained that congressional supporters of the Thirteenth Amendment spoke with "imprecision" about what constituted freedom. Their "heightened language" reflected their exultation but failed to provide useful legislative history to guide future interpretation.⁷⁶ "[I]n construing the amendment, there is need to

74. J. Morgan Kousser, *The Supremacy of Equal Rights: The Struggle Against Racial Discrimination in Antebellum Massachusetts and the Foundations of the Fourteenth Amendment*, 82 NW. U. L. REV. 941, 988–89 (1988); James B. Stewart & George R. Price, *The Roberts Case, the Easton Family, and the Dynamics of the Abolitionist Movement in Massachusetts, 1776–1870*, in JAMES B. STEWART, *ABOLITIONIST POLITICS AND THE COMING OF THE CIVIL WAR* 61, 61–88 (2008).

75. CONG. GLOBE, 38th Cong., 1st Sess. 1482–83 (1864).

76. CHARLES FAIRMAN, 6 *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864–1888*, at 1134–35 (1971).

distinguish between sanguine prophecies and cold propositions about legal consequences,” he wrote.⁷⁷

Fairman’s criticism would have been appropriate if Americans had been concerned primarily with the Amendment’s impact on constitutional law. But Republicans expected the Thirteenth Amendment to affect future constitutional politics. From that standpoint, the “heightened language” that Fairman dismissed was more relevant than the “cold propositions” of law that he would have preferred. Republicans did not address the precise meaning of freedom because that was not the constitutional issue before the American people. With rare exceptions,⁷⁸ Democratic opponents did not attack the proposed Amendment for the rights it might have promised the emancipated slaves.⁷⁹ Democrats articulated bitterly racist arguments on the stump and in other congressional debates, but the few references to race in the Amendment debates were mild. The Amendment “utterly ignores the greatest evil of slavery . . . in completely debasing the subject of it and making him unfit either to be a good citizen or a good man,” was as far as one opponent went, for example.⁸⁰ No congressman expressed opposition to the Amendment on account of the constitutional rights it might secure to those it freed, nor did any proponent try to catalogue them. Even Maryland’s Reverdy Johnson, the great constitutional lawyer, eschewed the question as he surprised Democrats with a forceful argument in favor of the Amendment.⁸¹ Democrats only offered one amendment making race

77. *Id.*

78. For one exception, see the warning of Indiana’s Democratic Representative William S. Holman, who said that freedom implied participation in government and thus African-American suffrage, without charging Republicans with the intent to enfranchise freedmen. CONG. GLOBE, 38th Cong., 1st Sess. 2962 (1864). Indiana Democrat Joseph K. Edgerton was not so charitable. *Id.* at 2987 (1864).

79. It seems remarkable that Democrats did not demand that Republicans define what the status of freed slaves would be, thus playing to the white racism that might have derailed emancipation. Although Democratic opponents of the Amendment often referred to African-Americans in racist terms, only three of them either challenged Republicans to articulate the future status of the freed people or suggested that emancipation implied equal rights: Representative William S. Holman (D-Ind.), *id.* at 2962 (1864); Robert Mallory (D-Ky.), *id.* at 2982–83 (1864); Joseph K. Edgerton, (D-Ind.) *id.* at 2987 (1864). It is less surprising that Republicans, knowing the depth of racism even in the North, did not volunteer the information.

80. CONG. GLOBE, 38th Cong., 2d Sess. 527 (1865) (Rep. Brown, D-Wis.).

81. CONG. GLOBE, 38th Cong., 1st Sess. 1422–24 (1864) (Unionist-Md.). Elected to the Senate as a Whig, Johnson supported Democrat Stephen A. Douglas for president in 1860. Although he is identified as a “unionist” in the 38th Congress (1863–1865), he generally cooperated with Democrats in the Senate, although he broke with them to support the Thirteenth Amendment. By the 39th Congress (1865–1867) the *Congressional Directory* identified him as a Democrat. See BIOGRAPHICAL DIRECTORY OF THE UNITED STATES

an issue—a proposition to substitute for the whole amendment a constitutional provision declaring that no Negro should be a citizen nor be eligible to hold any civil or military office.⁸² No one debated it, and it was defeated overwhelmingly, with Johnson voting against it even though he had been Sanford's lawyer in the *Dred Scott* case and despite the fact that only a few hours earlier, debating another measure, he had said that case had settled African-Americans' status.⁸³

Instead, Democrats attacked the Amendment as the emblem of a new constitutional order. They insisted that "the protection which the Constitution threw around the slavery system of the South . . . was in fact the very bond of our Union,"⁸⁴ and they feared that the Amendment abolishing slavery would make "a virtually *new Constitution*."⁸⁵ For Democrats, it was a question of "whether we shall alter the whole structure and theory of government by changing the basis upon which it rests."⁸⁶

The Amendment marked a revolutionary intrusion into the right of the states to order their domestic relations. One Democrat commented: "It is in conflict with the principles on which the Union was originally formed, and with the whole theory and spirit of the Constitution as to the rights of the States."⁸⁷ It may be limited to slavery, said Kentucky's Senator Garrett Davis, but it

carries a general principle which is as hostile to other peculiarly local and State institutions and interests as to slavery. . . . If this proposed alteration of the Constitution be accepted it will be a precedent, and may establish a principle that may carry those other domestic concerns . . . into the domain of an encroaching and centralized despotism.⁸⁸

Indiana Democrat Joseph K. Edgerton urged: "[The Amendment] might as well propose that freedom of religious opinion should be abolished," or regulate marriage, or "regulate the relations of par-

CONGRESS, 1774–PRESENT, <http://bioguide.congress.gov/biosearch/biosearch.asp> (last visited Sept. 24, 2011).

82. The Senate voted on the amendment twice. CONG. GLOBE, 38th Cong., 1st Sess. 1370 (1864); *id.* at 1424 (1864).

83. CONG. GLOBE, 38th Cong., 1st Sess. 1370 (1864). Johnson had explicitly declared that African-Americans were not citizens while debating a bill creating a territorial government in Montana. *Id.* at 1362–63 (1864).

84. *Id.* at 2616 (1864) (Rep. Herrick, D-N.Y.).

85. *Id.* at 2615 (emphasis in original).

86. *Id.* at 2940 (1864) (Rep. Fernando Wood, D-N.Y.).

87. *Id.* at 2986 (1864) (Rep. Edgerton, D-Ind.).

88. CONG. GLOBE, 38th Cong., 1st Sess. App. 104, 106 (1864).

ent and child, or the canons of property, or the elective franchise.”⁸⁹ “The principle of the proposed amendment is the principle of consolidation,” and its passage would be “a final subversion of our constitutional Government,” he said. In Edgerton’s opinion, it was “[b]etter . . . for our country, better for man, that negro slavery exist a thousand years than that American white men lose their constitutional liberty in the extinction of the constitutional sovereignty of the Federal States of this Union.”⁹⁰

For some Democrats, like the Copperhead Fernando Wood, the issue went beyond federalism into the relationship between government and civil liberty in general. The Constitution created a Union “for certain specified objects,” he insisted, “none of them relating to or affecting in any manner individual or personal interests in those things which touch the domestic concerns.”⁹¹ The Amendment would bring federal power to bear on what Wood and like-minded Democrats considered a domestic institution of the same sort as marriage, religious belief, private property, “and all matters purely social.”⁹² It reflected “the idea which has been derived from despotism and the notions of feudal powers that Governments are omnipotent, and draw within their sphere all that belongs to the individual, even the liberty of thought, speech, and conscience,” he warned.⁹³

Because the change was so profound, Democrats argued that the Amendment exceeded the power of constitutional amendment itself. The power to amend the Constitution was limited “by the idea which underlies it all as a foundation,” posited Ohio’s influential Democratic Representative George W. Pendleton.⁹⁴ Kentucky’s Senator Garrett Davis likewise insisted:

It never was the purpose of those who made [the Constitution] to subject many of its great principles to be expunged by the exercise of this power of amendment. . . . [T]here is a boundary between the power of revolution and the power of amendment, which the latter . . . cannot pass; and that if

89. CONG. GLOBE, 38th Cong., 1st Sess. 2986, 2987 (1864).

90. *Id.* See also *id.* at 2991 (1864) (Rep. Randall, D-Pa.); CONG. GLOBE, 38th Cong., 2d Sess. 219 (1865) (Rep. Holman, D-Ind.); *id.* at 242 (1865) (Rep. Cox, D-Ohio), *id.* at 481 (1865) (Rep. Finck, D-Ohio).

91. CONG. GLOBE, 38th Cong., 1st Sess. 2940 (1864) (Rep. Fernando Wood, D-N.Y.).

92. *Id.*

93. *Id.*

94. CONG. GLOBE, 38th Cong., 2d Sess. 221 (1865).

the proposed change is revolutionary it would be null and void notwithstanding it might be formally adopted.⁹⁵

Another Democrat in the House of Representatives asked, “[W]hat safety there would be in a Republic like this if three fourths of the States could deprive the other fourth of those rights, jurisdiction over which was not delegated by the States to the General Government?” and added, “Would not the whole framework of the Government be thereby overthrown?”⁹⁶ That limit applied to all the areas of jurisdiction the original Constitution reserved to the states, he made clear. No constitutional amendment could touch state jurisdiction. Otherwise

the marital rights, the rights of husband and wife, of parent and child, of master and servants; the right of licensing hotels, the right of making private contracts, the rights of courts . . . the rights of suffrage for State officers, constitutions of States and all the rights which now belong to the States, upon the same principle may be interfered with, abolished, and annulled.⁹⁷

Precisely one Democrat had so exalted a view of judicial power as to suggest that courts might nullify the proposed Amendment.⁹⁸ Davis may have implied something similar when he said the Amendment would be “null and void.”⁹⁹ No other Democrat even hinted at such a possibility. With a presidential election looming, Democrats were addressing their arguments to the people, not to future generations of lawyers and judges. “[I]f we intend to secure to ourselves the imperishable boon to speak, to act as a free people, and to enjoy liberty and preserve our rights, we must retrace our steps to a strict obser-

95. CONG. GLOBE, 38th Cong., 2d Sess. App. 104, 106 (1864). See also CONG. GLOBE, 38th Cong., 1st Sess. 1366–67 (1864) (Sen. Saulsbury, D-Del.) (arguing against the Amendment on the theory that the Constitution should not allow three-fourths of the states to deprive citizens in the other states of property rights); *id.* at 1458 (1864) (Sen. Hendricks, D-Ind.) (arguing that abolition goes beyond the legitimate power of amendment because slavery predated the Constitution and was “an institution of the colonies”); *id.* at 2939 (1864) (Rep. Pruyn, D-N.Y.) (arguing the Amendment is outside the scope of the original Constitution and therefore invalid); CONG. GLOBE, 38th Cong., 2d Sess. 214 (1865) (Rep. C.A. White, D-Ohio) (arguing the Constitution can be amended only in ways consistent with the original document and not to “supplement” it with new provisions “disconnected” with an existing grant of power).

96. *Id.* at 152 (1865) (Rep. Rogers, D-N.J.).

97. *Id.* at 151 (1865) (Rep. Rogers, D-N.J.).

98. CONG. GLOBE, 38th Cong., 2d Sess. 523 (1865) (Rep. Coffroth, D-Pa.). A lone Republican seemed to agree that the Supreme Court might consider the question. *Id.* at 482 (1865) (Rep. Starr, R-N.J.).

99. CONG. GLOBE, 38th Cong., 1st Sess. App. 106 (1864) (Sen. Davis, D-Ky.).

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vance of the laws and the Constitution,” one such Democrat urged. “The question is with the people to decide.”¹⁰⁰

Democratic opponents of the Amendment expected the people to sustain them and their constitutional arguments in the congressional and presidential elections of 1864.¹⁰¹ Those were the arguments Republicans had to answer and the people were the judges they had to address. Republicans responded by lambasting the proslavery constitutional order Democrats had imposed on the nation and by recounting the inhumane legal rules necessary to maintain it. When Democrats denounced the proposed amendment for depriving southerners of property rights, a New York Republican sputtered sarcastically, “I have never until this morning understood to its full and perfect extent the definition of *civil liberty*.” He had learned from the opponents of the Amendment “that civil liberty consists in the right of one people to enslave another people”¹⁰² He denied it: “Nature made all men free, and entitled them to equal rights before the law; and this Government of ours must stand upon this principle”¹⁰³

In place of a constitutional order that exalted the property rights of slave owners, the Amendment would re-establish a constitutional order dedicated to freedom, which Republicans insisted the Framers had intended and slave owners had subverted. The Constitution was ordained and established to secure the blessings of liberty. Slavery “pervert[ed] its end and aim!” New Hampshire’s Republican Senator Daniel Clark lamented.¹⁰⁴ “[T]his is not a mere struggle between the North and the South; it is a conflict between two systems,” a Republican representative observed.¹⁰⁵

The Thirteenth Amendment turned upon the question of whether the United States would be “a nation of freemen or slaves.”¹⁰⁶ Its ratification, said New Hampshire Republican Senator John P. Hale, would mark the day when Americans would finally live up to “the sublime truths which their fathers uttered years ago and which have slumbered dead letters upon the pages of our Constitution.”¹⁰⁷ “The America of the past is gone forever,” another Republican affirmed: “A

100. CONG. GLOBE, 38th Cong., 1st Sess. 2954 (1864) (Rep. Coffroth, D-Pa.).

101. *Id.* at 2951 (1864) (Rep. Marcy, D-N.H.); *id.* at 2958 (1864) (Rep. Ross, D-Ill.).

102. CONG. GLOBE, 38th Cong., 2d Sess. 154 (1865) (Rep. Davis, R-N.Y.).

103. *Id.*

104. CONG. GLOBE, 38th Cong., 1st Sess. 1368–69 (1864). For similar views, see *id.* at 2943 (1864) (Rep. Higby, R-Cal.); *id.* at 2949 (1864) (Rep. Shannon, R-Cal.).

105. *Id.* at 2615 (1864) (Rep. Daniel Morris, R-N.Y.).

106. *Id.*

107. *Id.* at 1443 (1864) (Sen. Hale, R-N.H.).

new nation is to be born from the agony through which the people are now passing. . . . Let us now, to-day, in the name of liberty, justice, and of God, consummate this grand revolution. Let us to-day make our country, our whole country, *the home of the free*.”¹⁰⁸

Republicans identified “true national greatness” with “[s]mall farms, small towns, manufacturing communities and villages, rather than cities or large estates.”¹⁰⁹ “To each of these slavery is in antagonism,” they insisted. It “rolls back the car of civilization, and brings us once more into the feudal age With it the statesmanship that labors to secure ‘the greatest good to the greatest number’ is inverted, and the greatest good to the smallest number is substituted.”¹¹⁰ Oppressive as slavery was for black slaves, it was almost as oppressive for poor, non-slaveholding whites. The Amendment would “elevate and disinthrall [sic] that most injured and dependent class of our fellow white men from their downtrodden and degraded condition, that they too may be men, and enjoy the independence and rights of manhood.”¹¹¹

Republicans associated such a free society with prosperity and progress. Managing the Amendment through the House in 1865, Ohio’s James M. Ashley eschewed presenting “an array of facts and figures” to demonstrate the superiority of free over slave labor.¹¹² “All thinking men have examined and comprehend the priceless value of free labor,” he said. Pass the Amendment “and the free-laboring men of the North and of Europe will flock to the South.”¹¹³ Add the value of emancipated black labor, “and you have a free-labor force which . . . will make the land to blossom like the rose.”¹¹⁴ Republicans contrasted the prosperity and progress of the free North and West with the poverty and inertia of the South,¹¹⁵ to which a flabbergasted

108. *Id.* at 2989 (1864) (Rep. Arnold, R-Ill.) (emphasis in original). See Representative Godlove S. Orth’s similar language:

The nation is being born again, and from the fire and smoke of battle, from its death groans of agony, . . . the American Republic will emerge wiser, better, purer, and more powerful. . . . We are to develop, to mature, to protect every energy, every sentiment, every aspiration in man’s nature, to secure to him every natural right, to demonstrate to the world his capacity for civil, social religious, mental, and physical enjoyment.

CONG. GLOBE, 38th Cong., 2d Sess. 144 (1865) (Rep. Orth, R-Ind.).

109. CONG. GLOBE, 38th Cong., 1st Sess. 2948 (1864) (Rep. Shannon, R-Cal.).

110. *Id.*

111. *Id.*

112. CONG. GLOBE, 38th Cong., 2d Sess. 141 (1865).

113. *Id.*

114. *Id.*

115. CONG. GLOBE, 38th Cong., 1st Sess. 2979 (1864) (Rep. Farnsworth, R-Ill.).

Democrat queried, “How long . . . is it since it was discovered that the country could not prosper under our Constitution?”¹¹⁶ The argument that the Thirteenth Amendment was necessary to secure national prosperity “is either a crazy delusion or a wicked and willful falsehood,” so inane “that to me it seems almost absurd to attempt seriously to refute it.”¹¹⁷

Republicans dismissed the proposition that some fundamental principle of the Constitution precluded an amendment abolishing slavery. “[T]he question . . . seems to be simply this: can we amend the Constitution in the way in which the Constitution itself says it may be amended?” one bemused Republican observed.¹¹⁸ There could be no doubt of Congress’s power to submit the Amendment—“[u]nless the Constitution be itself unconstitutional.”¹¹⁹ Article V of the Constitution, which specified how it could be amended, is “just as full of vitality as it was the day our fathers established it as a part of the Constitution of this country,” declaimed yet another Republican.¹²⁰ They turned state-sovereignty arguments against their proponents, pointing out that “[t]here is nowhere contemplated in the Constitution of the United States any action . . . that more completely acknowledges and recognizes State sovereignty than this very provision of the Constitution explaining how it may be amended.”¹²¹

Of course, most Republicans repudiated Democratic notions of state sovereignty. Sovereignty lay in the American people, they insisted:

Upon what ground . . . are the people of the United States to be told that they cannot, if they choose, improve the fundamental law of their Government? . . . [T]his is a matter for the people of the United States. We are not amending the Constitution We propose . . . to afford the people the opportunity of amending their Constitution if they see proper to exercise that power.¹²²

116. *Id.* at 2946 (1864) (Rep. Kalbfleisch, D-N.Y.).

117. *Id.*

118. CONG. GLOBE, 38th Cong., 2d Sess. 225 (1865) (Rep. Jenckes, R-R.I.).

119. *Id.* at 216 (1865) (Rep. Smithers, Unconditional Unionist-Del.).

120. CONG. GLOBE, 38th Cong., 1st Sess. 2943 (1864) (Rep. Higby, R-Cal.).

121. *Id.*

122. *Id.* at 2980 (1864) (Rep. Thayer, R-Pa.). *See also* CONG. GLOBE, 38th Cong., 2d Sess. 142 (1865) (Rep. Orth, R-Ind.) (“Congress cannot amend the Constitution. . . . [W]e, by our action here, simply authorize the people to determine for themselves whether they will ratify or reject the proposed amendment.”); *id.* at 485 (1865) (Rep. Morris, R-N.Y.) (“The States have delegated nothing to the General Government. The General Government is

Although many Republicans scouted any limitation upon the amending power beyond the two expressly mentioned in Article V,¹²³ others conceded that there must be some limitations, no doubt recognizing the power of Democratic arguments that the Thirteenth Amendment might set a precedent for amending away fundamental civil liberties. Congressman Ashley of Ohio held that the Constitution could be modified by “any amendment, republican in its character and consistent with the continued existence of the nation.”¹²⁴ George S. Boutwell took a similar position, opining that Constitutional amendments must be consistent with the preamble’s statement of the purposes for which the Constitution was framed. To that end, he stated,

[A]n amendment which tends to “a more perfect union, to establish justice, to insure domestic tranquility, to provide for the common defense, to promote the general welfare, and to secure the blessings of liberty to ourselves and our posterity,” is an amendment which, when made according to the form prescribed in the Constitution, is both morally and legally binding upon the people of the country.¹²⁵

Obviously, the Thirteenth Amendment satisfied every count.

Ashley used the issue to discredit the “fatal heresy” that linked state rights to state sovereignty. The limits Democrats placed on the power to amend the Constitution made “the States sovereign, the Government a confederation, and the United States not a nation.” That version of state rights was “at war with the fundamental principles of the Constitution,” and led directly to the rebellion. “To thinking men nothing seems more absurd than the political heresy called States rights in the sense which makes each State sovereign and the national Government the mere agent and creature of the States.”¹²⁶ Ashley continued with a long, thorough exposition of the

not the creature of the States, but of an entire people. The people established a Constitution, and provided therein for amendments thereto.”).

123. Article V barred an amendment to the Constitution that would modify the provisions of Article IX that delayed until 1808 Congress’s authority to pass a law abolishing the slave trade or levying a direct tax on slaves. Article V still precludes amending the Constitution to deprive any state of equal representation in the Senate without its consent. *See* U.S. CONST. art. V (“[N]o Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”).

124. CONG. GLOBE, 38th Cong., 2d Sess. 139 (1865) (Rep. Ashley, R-Ohio).

125. *Id.* at 222–23 (1865) (Rep. Boutwell, R-Mass.).

126. *Id.* at 139 (1865) (Rep. Ashley, R-Ohio).

nationalist interpretation of the origins of the Constitution, concluding:

It is past comprehension how any man with the Constitution before him, and this history of the convention which formed that Constitution within his reach, together with the repeated decisions of the Supreme Court against the assumption of the State rights pretensions, can be found at this late day defending the State sovereignty dogmas, and claiming that the national constitution cannot be so amended as to prohibit slavery¹²⁷

As Michael Vorenberg stated, Republicans “saw in the amendment an issue that they could use to define themselves *against* the Democrats in the upcoming elections.”¹²⁸ And, as had been the case throughout the antebellum years, the partisan distinction was one of constitutional philosophy. Democrats and Republicans presented a direct and clear choice to the American people: preserve a chance for a restoration of the Union by adhering to the prewar, proslavery Constitution—“the Union as it was, the Constitution as it is,” in the words of the Democratic slogan¹²⁹—or commit to a war to reconstruct the Union on the basis of freedom.

In those terms, it made perfect sense for Massachusetts Republican Senator Henry Wilson to “exult” that the Amendment “will obliterate the last lingering vestiges of the slave system; its chattelizing, degrading, and bloody codes; its dark, malignant, barbarizing spirit; all it was and is, everything connected with it or pertaining to it, from the face of the nation,” and to predict that “the nation, ‘regenerated and disenthralled by the genius of universal emancipation,’ will run the career of development, power, and glory, quickened, animated, and

127. *Id.*; see also *id.* at 482–85 (1865) (Rep. Patterson, R-N.H.) (noting that states “were never supreme and unlimited in their sovereignty” and describing “the privileges which belong to the national Government”).

128. MICHAEL VORENBERG, *supra* note 14, at 90 (emphasis in original).

129. See *The Union as It Was, and the Constitution as It Is*, N.Y. TIMES, Oct. 18, 1864 (“Look at the front of Tammany Hall, or at almost any of the Copperhead banners swung over the street, and you see beneath the Janus-faced portraits of MCCLELLAN and PENDLETON, the inscription—‘The Union as it was, and the Constitution as it is.’”). For the way the slogan summarized the Democratic constitutional argument, see JEAN H. BAKER, *AFFAIRS OF PARTY: THE POLITICAL CULTURE OF NORTHERN DEMOCRATS IN THE MID-NINETEENTH CENTURY* 143–76 (1983) (mentioning the slogan at 152) and JOEL H. SILBEY, *A RESPECTABLE MINORITY: THE DEMOCRATIC PARTY IN THE CIVIL WAR ERA, 1860–1868*, at 70–88 (1977) (mentioning the slogan at 87).

guided by the spirit of the Christian democracy that ‘pulls not the highest down, but lifts the lowest up.’”¹³⁰

Wilson and his colleagues did not expect the courts to establish this new order. They hoped courts would be a part of it. But the Amendment’s proponents and opponents were engaged in constitutional politics not constitutional law. Wilson’s prediction precisely reflected Shaw’s understanding of constitutionalism. The antislavery principle that the Thirteenth Amendment would incorporate into the Constitution would, in Shaw’s words, “influence and direct the judgment and conscience of legislators in making laws, rather than . . . limit and control them, by directing what precise laws they shall make.”¹³¹

This did not mean that Republicans were unconcerned about how courts might understand the Amendment. Sumner hoped judges would join the effort to dedicate the nation to freedom, but he did not intend to rely on them. “[O]ne of the saddest chapters in our history has been the conduct of judges, who have lent themselves to the support of slavery,” he lamented.¹³² “Injunctions of the Constitution, guarantees of personal liberty, and prohibitions against its invasion, have all been forgotten.”¹³³ Sumner wanted to include a declaration of equal rights as part of the Amendment in order to establish the same principle that had led the people of Massachusetts to ban school segregation. He did not trust courts, a sentiment understandable in light of his experience as Roberts’s lawyer. Michigan Republican Jacob M. Howard, likewise a lawyer and a member of the Senate Judiciary Committee that framed the Amendment’s language, opposed Sumner’s proposal pretty much for the same reason Sumner made it. “[I]n a legal and technical sense that language is utterly insignificant and meaningless as a clause of the Constitution,” he admonished his colleague.¹³⁴ “[W]hat effect this would have in law in a court of justice?” he asked. “What significance is given to the phrase ‘equal’ or ‘free’ before the law in a common-law court? It is not

130. CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864). Likewise Republican Illinois Representative Ebon Ingersoll’s expectation that the ratification of the Amendment would lead to the establishment of free speech in all the states, that with abolition “school-houses will rise upon the ruins of the slave mart, intelligence will take the place of ignorance, wealth of poverty, and honor of degradation; industry will go hand in hand with virtue, and prosperity with happiness, and a disenthralled and regenerated people will rise up and bless you and be an honor to the American Republic.” *Id.* at 2990 (1864).

131. *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 206–07 (1849).

132. CONG. GLOBE, 38th Cong., 1st Sess. 1481 (1864) (Sen. Sumner, R-Mass.).

133. *Id.*

134. *Id.* at 1488 (1864) (Sen. Howard, R-Mich.).

known at all.”¹³⁵ The Judiciary Committee’s language, on the other hand, was drawn from the antislavery provision of the Northwest Ordinance, “an expression which has been adjudicated upon repeatedly, which is perfectly well understood both by the public and by judicial tribunals.”¹³⁶

Howard was, we can now see, looking toward the future—a future in which Americans would rely on courts as the prime protectors of constitutional rights. For that purpose, the language had to be precise and to include terms of known legal import. But at the time, Howard was the only Republican in either house of Congress to discuss how courts might interpret the Thirteenth Amendment. Exactly what freedom meant was an argument for another day, addressed to the American people in 1866, after southern states’ legislatures forced the issue by passing the Black Codes. No Republican then suggested relying on the courts to decide whether the Black Codes were consistent with the Thirteenth Amendment. Instead they passed the Civil Rights Act of 1866, proposed the Fourteenth Amendment, and took the constitutional issue to the people, where it belonged.

V. CONCLUSION

What does the difference between the constitutional politics of the nineteenth century and the twenty-first century mean for enforcement of the Thirteenth Amendment? The logical outcome of the present system of constitutional politics, which recognizes judicial priority in construing the Constitution, is the Court’s claim in *City of Boerne v. Flores*¹³⁷ that the Court alone has the authority to define what constitutional provisions mean and the political branches must acquiesce in those determinations.¹³⁸ Should the Supreme Court treat the Thirteenth Amendment as an exception, somehow outside the present system of constitutional politics, because this is not how its framers understood the Court’s role when it was ratified? Would we, constitutional scholars bred in the current system, really favor that? After all, the same observation can be made of all earlier constitutional amendments and possibly of the Fourteenth as well.

135. *Id.*

136. *Id.* at 1489.

137. 521 U.S. 507 (1997).

138. *See id.* at 536 (“When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is.” (citations omitted)).

What of a more restrained proposition—that the Supreme Court should be more deferential to congressional enforcement of the Thirteenth Amendment than it is to state and federal actions that raise other constitutional questions? But, again, why limit this deference to the Thirteenth Amendment when all earlier amendments were products of the same system of constitutional politics as it was?

So perhaps the benefit of revisiting the constitutional politics of the nineteenth century is only to remind us that our ancestors lived in a significantly different constitutional world, to do what history does best—let us know that there have been alternative ways of solving human problems, in this case the problem of how to maintain liberty in a democratic republic. Only when we have that kind of knowledge can we consider whether the system of constitutional politics in which we live today—one that relies on the courts and constitutional law to decide constitutional issues rather than the people and constitutional politics—does a job better than the one in which our ancestors lived 150 years ago.